

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
v.)	Case No.: 05-CV-329-GKF (SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**REPLY TO STATE OF OKLAHOMA’S RESPONSE IN OPPOSITION TO
MOTION OF THE NATIONAL CHICKEN COUNCIL, U.S. POULTRY & EGG
ASSOCIATION, AND THE NATIONAL TURKEY FEDERATION FOR
PERMISSION TO FILE BRIEF AS *AMICI CURIAE* IN OPPOSITION TO
THE PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

The National Chicken Council, U.S. Poultry & Egg Association and National Turkey Federation (collectively, “National Poultry Movants”) respectfully submit this reply in support of their Motion for Permission to File Brief as *Amici Curiae*. [DKT #1542]. In its opposition, Oklahoma asserts that the National Poultry Movants’ legal argument is not useful to the Court, and that the motion is untimely. Okla. Resp. at 1 [DKT #1568]. Each assertion plainly is wrong.

1. National Poultry Movants’ Legal Argument Not Only Has Utility; It Should Be Considered

Only the Court can decide whether National Poultry Movants’ legal argument has utility in deciding Oklahoma’s Motion for Preliminary Injunction. The Court’s consideration of utility requires a clear statement of the argument, but Oklahoma’s opposition fails to provide one. National Poultry Movants state their argument as follows.

Oklahoma's Motion for Preliminary Injunction is premised on the State's allegation that over-application of poultry manure is causing runoff of contaminants from farm land into waters of the IRW. Taking that allegation as true, for the sake of argument, means that the category of activities and substances at which Oklahoma aims its Motion is subject to specific requirements, prohibitions, standards, enforcement actions, citizen suits and potential sanctions under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 et seq. See Waterkeeper Alliance et al. v. EPA, 399 F.3d 486 (2d Cir. 2005). In view of the CWA's applicability, the Resource Conservation and Recovery Act ("RCRA") explicitly provides that it cannot be applied to such activities and substances in a manner that is inconsistent with the CWA. 42 U.S.C. § 6905(a). In similar fashion, RCRA also excludes from the definition of "solid waste" all material in industrial discharges which are point sources subject to permits under the CWA. Id., § 6903(27). For these reasons, Oklahoma cannot succeed on the merits of the RCRA claim embodied in its Motion.

Oklahoma's opposition fails to undermine the utility of National Poultry Movants' argument. First, the two RCRA exclusion provisions discussed above do not require that the activities and substances in question be actually "permitted" as Oklahoma contends. See Okla. Resp. at 3, n.1. By its terms, § 6905(a) applies if those activities are subject to the CWA in any fashion, not just to that statute's permit program. By definition, discharges from the over-application of CAFO manure would not be exempted from the CWA as agricultural stormwater, would not be permitted, but would be subject to potential enforcement actions or citizen

suits under the CWA. Similarly, the definitional exclusion set forth in § 6903(27), while stating that excluded activities should be “subject to permits” under the CWA, does not require that permits actually have been issued. See Proposed Brief of Amici Curiae at 9, n. 4. Second, Oklahoma contends, without explanation, that its blunderbuss motion is consistent with CWA requirements. See Okla. Resp. at 3, n.1. National Poultry Movants demonstrate in their brief why this contention is incorrect. See Proposed Brief of Amici Curiae at 10-13.

2. The Motion is Timely

This proceeding is scheduled to last into the first week of March, and may extend beyond that time. We respectfully submit that Plaintiffs should have ample time within that period to answer National Poultry Movants’ short amicus brief.

3. Conclusion

For the foregoing reasons, National Poultry Movants respectfully request that the Court grant their motion to file their amicus brief in support of Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction.

DATED this 22nd day of February, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 22nd of February, 2008, I electronically transmitted the foregoing document to the Clerk of the court using ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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